

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1450

STATE OF LOUISIANA

VERSUS

DOMINIQUE LAMAR RIVERS

*RMB
Densby
Gruy*

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 12-10-0474, Section VI
Honorable Richard M. "Chip" Moore, Judge Presiding**

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Dominique Lamar Rivers**

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered APR - 9 2014

PARRO, J.

The defendant, Dominique Lamar Rivers, was charged by grand jury indictment with second degree murder, in violation of LSA-R.S. 14:30.1.¹ The defendant pled not guilty. Following a jury trial, he was found guilty as charged. The trial court denied the defendant's motion for a new trial and motion for post-verdict judgment of acquittal. The defendant was sentenced to life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error to the trial court's denial of his motion for a mistrial. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On September 2, 2010, at approximately 8:30 a.m., in the Myrtle Place Apartments complex located at 1718 Boulevard De Province in Baton Rouge, Gregory Henry and his fiancée, Monique White, observed someone moving around inside the apartment of their neighbor, Derrick "Duke" Lucas (the victim). At the time, Henry and White were about to leave the complex to go pay their Demco electric bill. White was securing their child in the vehicle when Henry looked through a crack in the victim's apartment door, observed someone inside, and alerted White. As the victim's vehicle (a cement truck) was not in the parking lot when he first observed the individual in the apartment, Henry suspected that the individual was an intruder. Then the victim drove up in his cement truck, exited it (leaving the engine running), and walked through the door of his apartment. At one point the apartment door was closed but, as it was reopened, the victim was observed falling to the floor. Henry and White continued to observe the scene, and an individual, later identified as the defendant, exited the apartment, followed by the victim, who appeared "dazed" and was bleeding from the head. The defendant ran to a neighboring apartment. The victim knocked on the door of another apartment, apparently seeking assistance, but no one responded.

As the victim took out his cell phone, the defendant reapproached, this time armed with what appeared to be a gun. The defendant held the gun to the victim's

¹ The grand jury indictment originally charged the defendant with first degree murder and was amended by the state to reflect the above charge.

side and forced him to reenter his apartment, and the door was then shut. Seconds later, Henry and White heard three gunshots. They fearfully drove off after hearing the gunshots. The defendant peeked out of the victim's apartment door when Henry and White were pulling out of the parking lot and, at that point, White made eye contact with the defendant. White was unsure of the distance, but Henry testified that they were about fifty feet away from the defendant and the victim at the time of their observations. Both witnesses indicated that their view was unobstructed.

After leaving, Henry and White ultimately contacted the police. White noted that they did not immediately call the police because she assumed that someone else in the complex heard the gunshots and would call for assistance. Henry and White were asked to come to the police station, where they gave statements and identified the defendant from a photographic lineup. All being residents of the same complex, Henry and White were familiar with the victim and the defendant before the incident. The victim suffered two head lacerations and three gunshot wounds to the head, two being lethal.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that the state violated its duty to disclose exculpatory evidence, consisting of a recorded police interview of Henry. The defendant contends that the state played the interview during the trial, though it had not been seen or heard by the defense, in an attempt to impeach their own witness's testimony. The defendant notes that Henry never testified that he had problems remembering what happened or what he said in his police interview. The defendant argues that the evidence, concerning a potential eyewitness (an unidentified female) and a conflicting statement by Henry as to how the defendant entered the victim's apartment, was favorable to the defense. The defendant notes that the state's witnesses did not actually see the shooting in this case. The defendant argues that if the evidence had been previously disclosed to the defense in discovery, it may have exculpated the defendant. The defendant contends that the trial court erred in denying his motion for a mistrial on this basis.

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the state's case against him in order to prepare his defense. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1st Cir. 1986), writ denied, 501 So.2d 228 (La. 1987). The state's failure to comply with discovery procedures will not automatically demand a reversal. **State v. Gaudet**, 93-1641 (La. App 1st Cir. 6/24/94), 638 So.2d 1216, 1220, writ denied, 94-1926 (La. 12/16/94), 648 So.2d 386. If a defendant is lulled into a misapprehension of the strength of the state's case by the state's failure to fully disclose, such a prejudice may constitute reversible error. **Roy**, 496 So.2d at 590.

The defendant has no general constitutional right to unlimited discovery in a criminal case. **State v. Lynch**, 94-0543 (La. App. 1st Cir. 5/5/95), 655 So.2d 470, 478, writ denied, 95-1441 (La. 11/13/95), 662 So.2d 466. Under the United States Supreme Court decision in **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the state, upon request, must produce evidence that is favorable to the accused where it is material to guilt or punishment. **Brady**, 373 U.S. at 87, 83 S.Ct. at 1196-97. This rule has been expanded to include evidence that impeaches the testimony of a witness, when the reliability or credibility of that witness may be determinative of guilt or innocence. **Giglio v. United States**, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). The test for determining materiality was firmly established in **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and has been applied by the Louisiana Supreme Court. See **State v. Rosiere**, 488 So.2d 965, 970-71 (La. 1986). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. **Kyles v. Whitley**, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995) (citing **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383).

Late disclosure, as well as nondisclosure, of evidence favorable to the defendant requires reversal if it has significantly impacted the defendant's opportunity to present the material effectively in his case and compromised the fundamental fairness of the trial. The impact on the defense of late disclosure of favorable evidence must be evaluated in the context of the entire record. **State v. Harris**, 01-2730 (La. 1/19/05), 892 So.2d 1238, 1250, cert. denied, 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005). The state's constitutional obligation to disclose exculpatory evidence does not relieve the defense of its obligation to conduct its own investigation and prepare a defense for trial as the state is not obligated under **Brady** or its progeny to furnish the defendant with information he already has or can obtain with reasonable diligence. **State v. Harper**, 10-0356 (La. 11/30/10), 53 So.3d 1263, 1271.

During the trial, on direct examination of Henry, the state attempted to refresh Henry's memory by questioning him about the audio-recorded interview that he gave to the police on the day of the shooting. The defense counsel objected, contending that the defense had not been given a copy of the interview, conceding that the defense had been provided with a summary or redacted portion of Henry's interview in police reports that indicated that the full interview was on disc. After hearing the audio-recorded interview, the defense counsel moved for mistrial on grounds of a **Brady** violation. The defense counsel specifically noted that, in the interview, Henry informed the police that a white lady who lived in the apartment complex was walking behind the defendant before the shooting and ran off once she heard the gunshots. The defense counsel further claimed that Henry said in the interview that the defendant entered the victim's apartment through the back door, noting that on direct examination Henry did not mention a back door. In her video-recorded interview, White also noted that she saw a white lady run away after the gunshots were fired. The police were unable to identify or locate the unidentified referenced female. The trial court initially stated it would grant the motion for mistrial, but ultimately found that the defendant would

obtain a fair trial and that there was no **Brady** violation, and denied the motion.² The defendant sought supervisory review, and this court denied his application. **State v. Rivers**, 13-0359 (La. App. 1st Cir. 3/8/13) (unpublished writ action).³ Subsequently, the defense played the interview while cross-examining Henry.

A mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Moreover, determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal absent an abuse of that discretion. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

We find that the defendant has failed to show that the state suppressed any exculpatory evidence in this case. The fact that a "white lady" was walking behind the defendant and ran away when she heard gunshots is not exculpatory or material to guilt or innocence. Additionally, Henry did not state during his recorded interview that the defendant used a back door. Instead, Henry surmised that the defendant entered the area from the back and noted that the fence was damaged. Henry did not indicate, during the pretrial interview or in his trial testimony, which door the defendant used to enter the apartment. He consistently indicated that the defendant was already in the apartment when he first saw him that morning. Thus, there was no conflict in the interview with the trial testimony indicating that the defendant was observed in the apartment through a crack in the front door. At any rate, the defendant had notice well before the trial that the witnesses gave recorded interviews to the police. Specifically, open-file discovery included police reports that expressly stated that the

² The trial began March 4, 2013. Prior to stating its final ruling on the motion for mistrial, the trial judge allowed the state to proffer that the defense had access to all of the evidence in this case, and that prior to a reset October 2012 trial date, one or both interviews were played in the district attorney's office in the presence of the defense. The defense counsel conceded White's interview was played, but denied that Henry's interview was played or tendered.

³ The defendant correctly asserts that a pretrial determination of the admissibility of evidence does not absolutely preclude a different decision on appeal. Nonetheless, judicial efficiency demands that this court accord great deference to its pretrial decisions unless it is apparent, in light of the subsequent trial record, that the determination was patently erroneous and produced an unjust result. **State v. Haynes**, 99-1973 (La. App. 1st Cir. 6/23/00), 762 So.2d 1247, 1253, writ denied, 00-2243 (La. 6/15/01), 793 So.2d 1236.

full recordings of the interviews of the witnesses were available. Further, the defendant was effectively able to cross-examine the witness, play the interview for the jury in its entirety, and present his defense.

We further note that even if a delay in discovery or a **Brady** violation did occur, it would not constitute reversible error without actual prejudice to the defendant's case. See State v. Francis, 00-2800 (La. App. 1st Cir. 9/28/01), 809 So.2d 1029, 1033. In this case, the defendant has failed to show how he was prejudiced or denied a fair trial. Moreover, the record does not reflect any manner in which the defendant might have been lulled into a misapprehension of the strength of the state's case. The defendant has failed to raise any substantial claim of suppression of evidence by the state that would create a reasonable doubt which would otherwise not exist in the context of the whole record. Thus, the defendant has not shown any substantial prejudice such that he was deprived of any reasonable expectation of a fair trial. We find that the trial court did not abuse its discretion in denying the motion for mistrial. The sole assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.